[redacted]

[redacted]

Petitioners,

vs.

MEXICAN NATIONAL RAILROAD COMPANY,

On Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

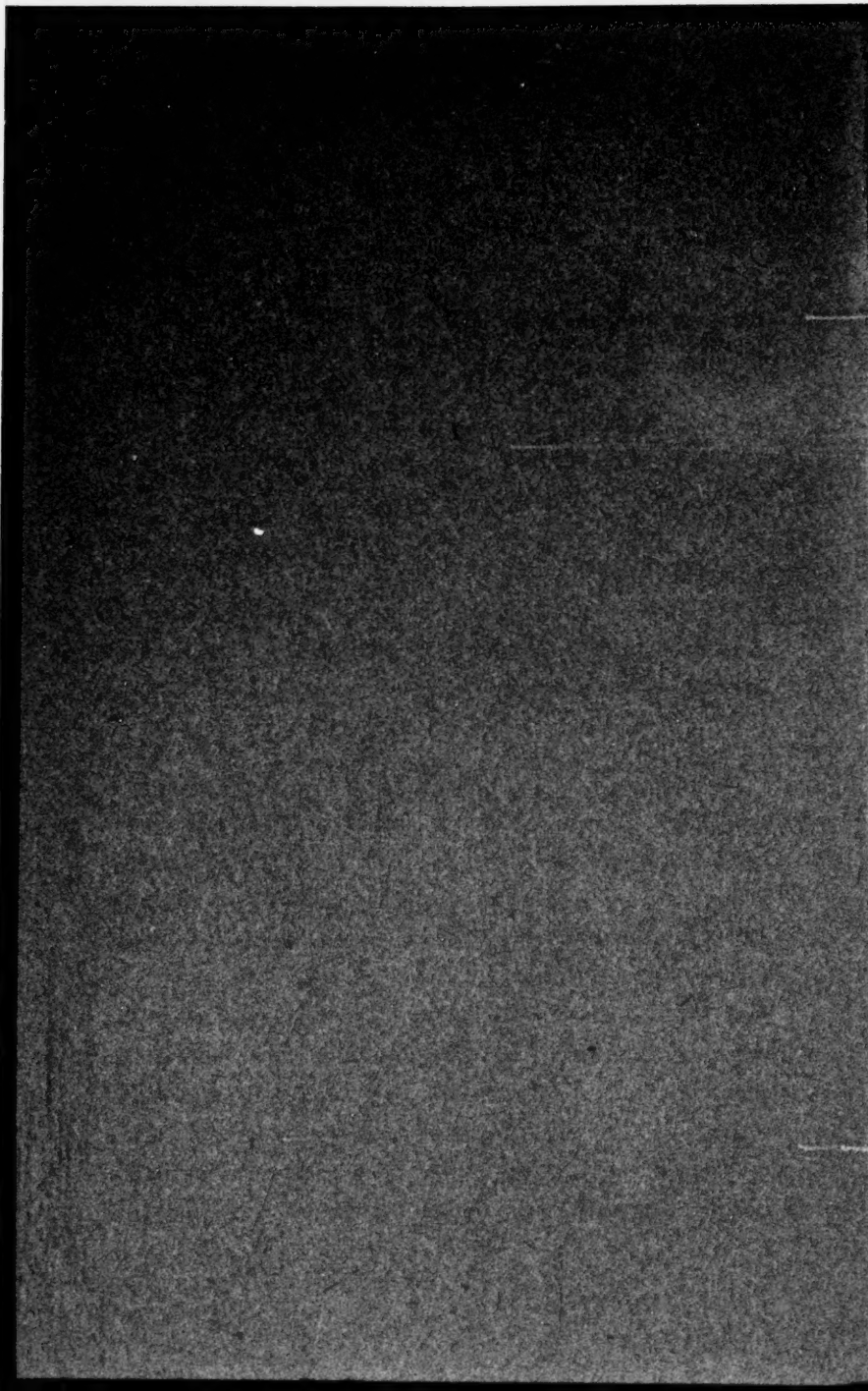
[redacted] OF RESPONDENT [redacted]

THE MEXICAN NATIONAL RAILROAD CO.

BY

LEROY G. DENMAN,
DENMAN, FRANKLIN & McCOWN,
Attorneys of Record for Defendant.

Law-Print Printing Co. 310 South Penn Street, San Antonio, Tex.



LENA M. SLATER, W. G. SLATER, JESSE R. SLATER, ANNIE E. SLADER and HENRY G. SLADER
vs.
MEXICAN NATIONAL RAILROAD CO.

No. 162.

Supreme Court of the United States.

May it please the Court:

We desire to submit a brief argument in addition to and in support of the brief heretofore filed herein by the respondent, the Mexican National Railroad Company.

PROPOSITION FIRST.

The right given by the Mexican law to the widow and children of Slater, in case his death was caused in Mexico by the negligence of the servants of the railroad, being one of support in the nature of alimony payable in installments, in amounts and during a period of time not ascertainable at the time of the accident or trial but dependent upon various circumstances thereafter to occur, no court has power or jurisdiction to administer that right unless the rules governing its procedure permit it from time to time after the rendition of the judgment fixing the liability for the accident, to inquire into and determine upon the application of either party whether the installments should be increased,

diminished or discontinued as to one or all of plaintiffs; and therefore the judgment of the Honorable United States Circuit Court of Appeals to the effect that the Honorable Circuit Court of the United States was without power or jurisdiction in the case, in that it could only render judgment as it did for a gross sum payable instantly, was correct and should be affirmed.

In order to determine the correctness of this proposition, it is important to ascertain *the exact nature* and *limitation* of the *right* conferred upon the plaintiffs by the Mexican statutes.

We will only quote here such of those statutes contained in the record as directly bear upon the question.

The civil responsibility for negligently causing the death of another in Mexico is directly fixed by the following articles from the Penal Code relating to "CIVIL LIABILITY in CRIMINAL MATTERS," to-wit:

"Art. 318. The civil responsibility that grows out of a homicide, done without right (or justification) comprehends the payment of the indispensable expenses of the burial of the body, the expenses and necessary charges made for the cure of the deceased, the damages that the homicide causes to the property of the deceased, and of the support not only of the widow, descendants and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave." (Rec. p. 6.)

"Art. 319. The obligation to furnish support shall last during all the time that the deceased might have lived if the homicide

had not killed him, and that time shall be calculated by the judges according to the table at the end of this chapter, but taking into consideration the state of the health of the deceased before the homicide was committed. As limitation of this rule the obligation shall cease: (1) At whatever time it shall not be absolutely necessary for the subsistance of those entitled to receive it. (2) When those beneficiaries get married. (3) When the minor children become of age. (4) In any other case in which according to law, the deceased, if alive, would not be required to continue the support." (Rec. p. 6.)

First it will be observed that said Article 318 fixes the items of responsibility at: (1) burial expenses, (2) expenses of sickness, (3) damage to property of the decedent by the homicide, and (4) the support of the widow and such descendants and ascendants of the deceased as *were being supported by him, provided he was under legal obligation to support them.*

The first three *items* of responsibility not being involved in this suit need not be discussed, but the fourth being involved demands notice.

It will be observed that the obligation imposed upon the *tort feasor* to support the persons mentioned depends upon two contingencies: (1) the deceased must have been supporting them at the time of the injury; and (2) he must have been under legal obligations to do so.

Let it be assumed for the purposes of this argument that Slater was actually supporting the plaintiffs, his widow and children, at the time of the injury resulting in his death. This would not alone entitle them to recover under said statute but he must be shown further to have been "under legal obligations to do so."

Now the only law pleaded and proved which goes to show such a legal obligation is to be found in Federal Civil Code, Chapter IV, pleaded by plaintiff (Rec. pp. 7 and 8), which law establishes the status between husband and wife, father and child and various other kindred in regard to the obligation respectively resting upon them of support; and this law must be resorted to in order to apply said Article 318 so as to impose upon respondent railway any obligation to support plaintiffs.

Article 206 of this law imposes upon the husband the duty of supporting the wife; Article 207 imposes upon the father the obligation of supporting his children; Article 208 imposes upon the children the obligation to support their parents; Article 205 provides that the obligation to give support is reciprocal; Article 211 provides that support comprehends eating, dress, habitation and assistance in case of sickness; Article 212 provides that the support of minors shall also include the expense of a primary education; Article 214 provides that the support should be proportioned to the ability of those furnishing and the necessities of those receiving; and Article 225 provides that the right to receive support cannot be renounced, nor is it an object of transfer or assignment, and a more correct translation of that article shown on page 18 of the record, provides that it cannot be *renounced* nor be made the *subject of a compromise between the parties.*

Taken as a whole these articles of the statute fix upon certain members of the family certain legal obligations with reference to the support of the others and forbids such parties from evading or relieving each other of such obligations, it being evidently the policy of the Mexican law to prevent a settlement *in solido,* the proceeds of which might be squandered and leave the parties

in need of the support either a charge upon society or without the means and opportunities of being reared and educated as useful members thereof.

Second, it will be observed that Article 319 above quoted undertakes to define the *extent* and *limitations* of the right to support referred to in Article 318 and in effect provides that it may continue as long as the deceased might have lived, calculating his probable life by a given table and considering his previous state of health; *but provides four other limitations upon the right,* to-wit: that it shall cease (1) at whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it; (2) when the beneficiaries get married; (3) when the minor children become of age; and (4) *in any other case in which, according to law, the deceased, if alive, would not be required to continue the support;* which last limitation evidently refers again to the provisions of said Federal Civil Code, Chapter IV, which is agreed to be correctly translated by Exhibit "A" to plaintiffs first supplemental petition (Rec. pp. 16 to 18), and Article 224 thereof provides, "The obligation to supply alimony ceases (1) when the one bound lacks the means of compliance; (2) when the dependent is no longer in need of alimony."

Thus it will be observed that Article 319 cannot be applied without referring to that portion of the Federal Civil Code aforsaid fixing the status as between relatives under the Mexican law in regard to support or alimony, and that such relative obligations are necessarily *limitations* upon the very *nature* and *extent* of the *right to support itself.*

Taken as a whole said Article 319 read in connection with said statute providing for support or alimony as between relatives

shows that the amount of money which the *tort feasor* may be liable for cannot be ascertained at the date of the death of the decedent, nor at the date of the trial, but is dependent upon conditions and circumstances thereafter to occur. The right, whether we term it support or alimony, is clearly not intended by the Mexican statutes to be made a matter of speculation or profit but is simply to impose upon the *tort feasor* to a *limited extent* the *legal obligation which the deceased* was under and *was actually performing toward the plaintiffs* at the date of his death. We say to a limited extent because said Article 318 as above shown does not impose the obligation of support upon the *tort feasor* in favor of all the kinsmen who had such a legal claim upon the deceased but *only to those of them whom the deceased was actually supporting,* and because said Article 319 does not impose the obligation of support of indigent children as fully as does said law of alimony, for it absolutely ends it when they get married or when they become of age; and to further show that these various provisions are *limitations* upon the right of support *beyond which it never existed* and not *conditions which will defeat the right,* we refer to Article 363 (Rec. p. 9), which reads:

"Article 363. Limitations: The various actions by which civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished *according to the terms and in the manner provided by the civil code* of the commercial code, according to the nature of the demand and the subject-matter treated of."

The principle upon which the Mexican law proceeds is eminently just and wise; for to the limited extent above indicated it

imposes upon the *tort feasor* the obligation of support which rested upon the deceased, and the decree of the court establishing that the homicide was caused by the negligence of the alleged *tort feasor* would fix "the civil responsibility under Article 318," but would leave the court under the provisions of said Article 319, considered in connection with the various articles of said Chapter IV and said Article 363, to increase, diminish or extinguish the periodical payments constituting such support at any time thereafter that it might be justified by the facts brought before the court.

That it was the settled purpose of the Mexican law that this sliding scale of payments should be made and that the limitations thereon as to time and amount should exist as a part of the right itself and not merely as a part of the remedy, is further evidenced by the fact that said Article 225 of Chapter IV as agreed to be correctly translated in Article 225 of Exhibit "A" (Rec. p. 18) provides that the right cannot be renounced by the beneficiary nor can it be the subject of compromise between the parties, and Article 218 of said Chapter IV, as shown in Exhibit "A" (Rec. p. 17), authorizes "the public department" to demand security for payment of the support or alimony. These provisions in connection with the entire laws above show that it is inconsistent with the very nature of the right granted and the limitations placed thereon by the Mexican law, for a court to undertake to adjudicate and administer the right unless it has the power under its procedure to increase, diminish or extinguish the payments from time to time according to the manifest spirit of the Mexican statutes. It is also evident from these provisions that this right of support is in the nature of a police regulation whereby the government fixes

between the *tort feasor* and the persons entitled to the support under said Article 318 a *status* of support and dependence which they cannot evade or settle by compromise or otherwise, and which may be enforced by the persons mentioned in said Article 218, one of which is "the public department."

Under these various statutes if these plaintiffs should at any time become residents of Mexico "the public department" as provided by said article of the statute could undoubtedly apply to a Mexican court and by establishing that Slater was negligently killed by the respondent's employes compel the respondent to provide for the support of his widow and children and such other persons as come within the provisions of Article 318, and the fact that the Circuit Court of the United States had in this cause rendered a judgment *in solido* for $7,000.00 in favor of the plaintiffs, and the fact that the respondent had paid said judgment in full would, we respectfully submit, be no bar to such action in the courts of Mexico because the Mexican courts could logically answer that the *right* administered by the Honorable Circuit Court of the United States *is not the right given by the Mexican law* and *does not carry out the very purpose and policy of that law,* but *directly thwarts the same* by undertaking to cancel a status of support and dependence established by that law between the *tort feasor* and the persons entitled to the support when that law forbids the cancellation or satisfaction of such status except by the performance of the obligation from time to time.

Again the Mexican statutes, in which this right of support for the death of Slater had its origin, does not, like the Texas statute which was administered by the Honorable Circuit Court at the trial, undertake to compensate plaintiffs for the damages the

jury may think resulted to plaintiffs from such death, under which the jury can and doubtless did consider all possible benefits they might have derived from the continued life of Slater, such as support, advice, gifts and even moneys he might accumulate and leave to them by will or inheritance, etc., but simply gives to them the *right of support limited by the various provisions of the statute referred to above;* and since a jury in undertaking to administer the Texas law as was given them in charge on the trial would necessarily arrive at a different amount than they would arrive at if given in charge the Mexican law with its various limitations, it is evident that the right adjudicated by the judgment of the Honorable Circuit Court on the trial below was an entirely different right from that given by the Mexican law. The Texas statutes and procedure do not permit of the administration of these intricate Mexican statutes in Texas courts, and the Supreme Court of Texas in the case of Jackson vs. Railway, 89 Texas Report, page 107, have so held; and since the United States Circuit Court are required by Revised Statutes of the United States, Article 914, to conform their proceedings as nearly as may be to the form and modes of procedure of courts of record of the State where the cause is being tried, it would appear that the Honorable Circuit Court of the United States has no procedure adapted to the administration of the right of support given by the Mexican law, and therefore no jurisdiction.

Jurisdiction is the power (1) to hear, (2) to determine, and (3) to enforce its decree. (89 Texas, 54; Riggs vs. Johnson Co., 6 Wall., 166.) If either of these powers be lacking, the court properly holds that it has no jurisdiction. Thus in De Poyster vs. Baker, 89 Texas, 160, the Supreme Court of Texas held that

although the language of the statute conferring jurisdiction to issue writs of mandamus was unqualified, still the court had no jurisdiction to issue such a writ in a case where there was a dispute as to a material fact, because the procedure provided for the Supreme Court was not such as to enable it in any of the recognized modes of procedure to determine such controverted fact, said court having no procedure for the taking of depositions, issuing of subpœnas, writs of attachment or the hearing of witnesses or the empaneling of a jury.

Again it is well settled that a court will not entertain a suit to compel the performance of a purely personal service such as compelling a songstress to sing, because there is no procedure provided by law for the enforcing of a decree establishing the obligation of the songstress to sing.

We contend that the Honorable Circuit Court of the United States has not any procedure whereby it can either properly proceed to a determination of the exact right given plaintiffs under the Mexican law or whereby it can after the right to support may have been established execute the decree with the limitations placed thereon by the Mexican law for the protection of the defendant railway's rights, and therefore that honorable court had no jurisdiction in the broad sense in which that term is used when applied to judicial proceedings.

Upon the whole, one cannot read the verdict and judgment rendered in the Honorable Circuit Court below for $7,000.00, which might have been for $15,000.00, as is often the case, and will doubtless occur in future cases if this judgment is sustained, without feeling that this judgment does not enforce in substance the right of support given under the Mexican law, but creates a

new right entirely foreign in its nature and in all probability excessive in its amount, and that by one stroke it attempts to settle and adjust between the parties a right of support which the Mexican law which created the right provided as a part thereof should not be settled or adjusted by the payment of a lump sum.

If the railroad company in Texas had entered into a contract agreeing to pay to the plaintiffs seven thousand dollars, and subsequently the Legislature of Texas had passed a law providing that contracts for the payment of money could be satisfied by the obligor undertaking the duty of support fixed by the Mexican law upon the railway in favor of plaintiffs under the provisions above, there could be no doubt that such a law would impair the obligation of the contract. Edwards vs. Kerzey, 96 United States, 595. And the same would be true if the railroad company had entered into a contract to support plaintiffs under the limitations imposed by the Mexican law above referred to and the Legislature of Texas had afterwards passed a law providing that such a contract could be discharged by the court rendering a judgment *in solido* as was done in this case. Both of the supposed laws would be unconstitutional and regarded as impairing the obligation of the contracts because the right given by the law would be different from the right given by the contract, or at least it could not be said that they are the same and their value would be affected.

Again, if this tort had been committed in Texas, where the law, as above indicated, permits the wife and children to recover whatever damages they may have sustained by reason of the death of Slater, which permits a very broad recovery, and after such death the Legislature of Texas had passed a law applying to

previous as well as subsequent torts giving the very right now given by the Mexican law in such a case, it is clear that such a law would be contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States to the effect. "Nor shall any State deprive any person * * * of property without due process of law;" for such subsequent law would not merely take away from the plaintiffs some of the remedies which they had for the enforcement of the right growing out of the tort under the old law, but would take away a large part of the recovery itself. (Louisiana vs. Mayor of New Orleans, 109 United States, 285.)

Again, if the death had occurred in Texas and the Texas statute had then given the same right of support to plaintiffs as is given by the Mexican statutes and subsequently the present Texas statute above referred to had been enacted giving the broader recovery *in solido* it could not be doubted that such subsequent statute applied to the previous cause of action would be contrary to said provision of the Fourteenth Amendment in that it would take the property of the railway without due process of law.

These illustrations based upon well adjudicated principles of constitutional law illustrate and make clear that the right administered by the Honorable Circuit Court of the United States was different in its nature from the right conferred by the Mexican statutes, and that it is not a mere question of difference of remedies as contended by petitioners herein.

PROPOSITION SECOND.

Since the statutes of Mexico above quoted provide that the right of support shall not be renounced or be the subject of compromise between the parties and further provide that such right may be enforced by "the public department" and others mentioned in Article 218, who may under the law of alimony be compelled at any time to support the plaintiffs after they have squandered the $7,000.00 given them by the judgment of the Honorable Circuit Court of the United States, it follows that said judgment of the Honorable Circuit Court of the United States is contrary to the policy of the very Mexican law which it undertakes to administer and not in accordance with the right given by the Mexican law, for it permits the parties by a suit to settle and adjust a right and sever a status fixed by the Mexican law which they could not under the law sever by any kind of an agreement.

If it be conceded that the Mexican law does not allow the *tort feasor* and the parties entitled to the support to rid themselves of the status or relationship imposed by the law by any kind of compromise or adjustment, it would appear to follow as a logical result that the court could not by judgment decreeing the payment of a specific sum accomplish that result. The judgment of the court should merely enforce the legal rights of the parties and should not permit them to do that which the very law creating such right prohibits.

In conclusion, we respectfully submit that the Republic of Mexico has given a right of support to plaintiffs with limitations indicated above and for the courts of this country to undertake under

the guise of administering that right to give a judgment *in solido* for damages in accordance with the Texas statute is just as much an invasion and an expansion of that right as it would be for a court to hold that a conveyance of a tract of land to *"A" until he is married is not a limitation of the estate itself,* and that it is not different from a conveyance of a *tract of land to "A" conditioned to be void upon his marriage,* it being elementary law that the former is a valid limitation upon A's estate in the land and that upon his marriage it ceases and terminates by force of its original creation and that in the latter the estate is absolute and carries the whole fee notwithstanding his marriage, the condition against marriage, which was intended to defeat the fee, being void as contrary to public policy.

The interest on the judgment allowed by the Honorable Circuit Court would doubtless provide for the support under the limitations of the Mexican law, leaving to the railway, the principal, when the obligation to suport is at an end, but the judgment of the Circuit Court turns over to the plaintiffs the entire sum at once.

Under a careful view the judgment of the Honorable Circuit Court administers a different right from that given by the Mexican law. It would seem that two quotations from the learned opinion of the Honorable Circuit Court of Appeals may here be aptly made, to-wit::

"Or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction. Higgins vs. Central New England Railroad, 155 Mass., 176, quoted with approval in Juntington vs. Attrell, 146 U. S., 657." (Rec. p. 91.)

"Possibly in the Texas State courts where the distinction between law and equity does not exist, or at equity in the courts of the United States, a decree might be passed fixing the liability of the defendant and retaining control of the parties to the suit and of the subject matter so as to enforce that liability with the limitations provided in the interest of the defendant. It is difficult to conceive what judgment at law the Circuit Court could render that would protect the interest of the defendant in the limiations put by the Mexican law on the plaintiffs right." (Rec. p. 97.)

We respectfully submit that the judgment of the Honorable United States Circuit Court of Appeals dismissing the cause for want of jurisdiction should be affirmed.

Respectfully submitted,

THE MEXICAN NATIONAL RAILROAD COMPANY,

By .....

For DENMAN, FRANKLIN & McGOWN.

Attorneys of Record.